

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES HEWEY LOCKLEAR,

Petitioner,

vs.

WASHINGTON STATE DEPARTMENT
OF CORRECTIONS,

Respondent.

NO. CV-06-259-EFS

ORDER DENYING PETITION

Before the Court, without oral argument, is Petitioner's Amended Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (Ct. Rec. 4). After reviewing the submitted material and relevant authority the Court is fully informed and denies Petitioner's amended petition for the reasons articulated below.

I. Background

On March 30, 2004, Petitioner James Hewey Locklear was sentenced by the Spokane County Superior Court for one count of Possession of a Controlled Substance with Intent to Distribute and one count of First Degree Unlawful Possession of a Firearm. According to a statement at sentencing by Mr. Cikutovich, Petitioner's attorney, "Mr. Locklear and the State of Washington agreed to a ten-year sentence based on his criminal history and the crime that was charged." (Ct. Rec. 10 Ex. 5 at

1 5.) Also at the sentencing hearing, Mr. Cikutovich noted objections to
2 the inclusion of two prior convictions in Petitioner's criminal history.
3 *Id.* at 14-15.

4 On March 30, 2005, Petitioner filed a Motion for Relief from
5 Judgment or Order Pursuant to CrR 7.8, in which Petitioner challenged
6 the calculation of his criminal history (Ct. Rec. 10 Ex. 6).
7 Petitioner's motion was subsequently transferred to the Court of Appeals
8 (Ct. Rec. 10 Ex. 8). On April 7, 2006, the Court of Appeals issued an
9 Order Dismissing Personal Restraint Petition in which the Court
10 addressed each of Petitioner's arguments regarding the calculation of
11 his criminal history (Ct. Rec. 10 Ex. 10). On May 4, 2006, Petitioner
12 filed a Motion for Extension of Time in which he requested an order from
13 the Washington Supreme Court extending the time in which he would be
14 required to file a motion for discretionary review (Ct. Rec. 10 Ex. 11).
15 Petitioner argued that he was attempting to "assimilate the dates of
16 time served, length of time served and dates of release" in order to
17 demonstrate that certain of his prior convictions should not have been
18 counted in his criminal history. *Id.* The Washington Supreme Court
19 denied Petitioner's motion for extension of time as well as Petitioner's
20 subsequent Motion to Modify (Ct. Rec. 10 Exs. 12 & 14).

21 **II. Request for Relief**

22 Petitioner's underlying complaint is based on Petitioner's
23 assertion that his criminal history was incorrectly calculated by the
24 Superior Court in which he was sentenced (Ct. Rec. 4). Pursuant to 28
25 U.S.C. § 2254(a), an application for a writ of habeas corpus can be
26 entertained only "on the ground that [petitioner] is in custody in
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1 violation of the Constitution or laws or treaties of the United States.”
2 Therefore, this Court has no authority to review a state court
3 application of state sentencing calculations unless a petitioner alleges
4 specific federal statutory or constitutional violations. While
5 Petitioner’s Amended petition does not indicate any federal law, treaty,
6 or constitutional provision Petitioner believes his custody violates, in
7 his Response to Authorities Request to Dismiss Petitioner’s Writ of
8 Habeas Corpus, Petitioner argues that his rights under the Fifth, Sixth,
9 and Fourteenth Amendments have been violated (Ct. Rec. 11 at 3). The
10 only potential constitutional violation the Court could discern on
11 review of the facts presented in Petitioner’s amended petition and other
12 filings, is a Fifth and Fourteenth Amendment Due Process violation based
13 on Petitioner’s claim that the Washington Supreme Court improperly
14 denied him an extension of time requested by Petitioner in order to
15 present evidence regarding his criminal history calculation. *Id.* at 2.

16 **III. Analysis and Conclusion**

17 Petitioner did not raise a Due Process challenge to the Washington
18 Supreme Court’s denial of the extension of time request in state court.
19 Therefore, this Court denies Petitioner’s habeas petition based on a
20 failure to exhaust state court remedies as required under 28 U.S.C. §
21 2254(b)(1)(A). In the alternative, the Court will review the petition
22 on the merits as Section 2254 permits denial on the merits despite a
23 petitioner’s failure to exhaust state court remedies. 28 U.S.C. §
24 2254(b)(2).

25 In order to succeed on the merits, Petitioner would need to show
26 that the Washington Supreme Court’s denial of a continuance was “so
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1 arbitrary as to violate due process." *Ungar v. Sarafite*, 376 U.S. 575,
2 589 (1964). "There are no mechanical tests for deciding when a denial
3 of a continuance" violates due process, rather "[t]he answer must be
4 found in the circumstances present in every case, particularly in the
5 reasons presented to [the Court] at the time the request is denied."
6 *Id.* (citing *Nilva v. United States*, 352 U.S. 385 (1957)).

7 Petitioner's Motion for Extension of Time, filed on May 4, 2006,
8 was based on Washington Rule of Appellate Procedure ("RAP") 18.8, which
9 holds: "[t]he appellate court will only in extraordinary circumstances
10 and to prevent a gross miscarriage of justice extend the time within
11 which a party must file a notice of appeal." RAP 18.8(b). As stated
12 above, Petitioner's request for an extension was based on Petitioner's
13 attempt to acquire records regarding the dates and lengths of time he
14 had served and his release dates (Ct. Rec. 10 Ex. 11).

15 Assuming all facts alleged by Petitioner to be true: assuming
16 Petitioner was able to show that certain portions of his criminal
17 history should have been calculated differently, and assuming a 60-day
18 extension would have enabled Petitioner to acquire the evidence needed
19 to demonstrate errors in the original calculation of his criminal
20 history, the Washington Supreme Court's decision to deny Petitioner's
21 motion for an extension of time was proper. RAP 18.8 requires that a
22 party demonstrate extraordinary circumstances and the possibility of a
23 gross miscarriage of justice before a court is to grant an extension for
24 a party to file a notice of appeal. The Washington Supreme Court found
25 Petitioner's motion failed to demonstrate extraordinary circumstances
26 and failed to identify the nature of the review Petitioner was
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1 requesting (Ct. Rec. 10 Ex. 12). Therefore, the Washington Supreme
2 Court's decision to deny Petitioner's request was not so arbitrary as to
3 violate due process.

4 **Accordingly, IT IS ORDERED:** Petitioner's Amended Petition Under 28
5 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody
6 **(Ct. Rec. 4) is DENIED.**

7 **IT IS SO ORDERED.** The District Court Executive is directed to:

- 8 1. Enter this Order;
9 2. Forward a copy to Petitioner and to counsel for Defendants;
10 3. Deny all other pending motions as moot;
11 4. Enter judgment for Defendants; and
12 5. Close this file.

13 **DATED** this 23rd day of April 2007.

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15 S/ Edward F. Shea
16 EDWARD F. SHEA
17 UNITED STATES DISTRICT JUDGE

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